

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

UNITED STATE OF AMERICA

v.

DAWANE ARTHUR MALLETT,
Defendant

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NO. 1:05-CR-57

**MEMORANDUM OPINION ADOPTING REPORT AND
RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE AND ORDER**

The Court heretofore referred this matter to the Honorable Earl S. Hines, United States Magistrate Judge, for consideration pursuant to applicable law and orders of this Court. The Court has received and considered the Report of the United States Magistrate Judge pursuant to such order. The Magistrate Judge recommended that the defendant's Rule 60(b) motion be construed as a successive motion to vacate pursuant to 28 U.S.C. § 2255, and that it be denied for lack of jurisdiction.

Objections were filed by the defendant. Defendant argues that Rule 60(b) does in fact authorize this court to vacate his judgment based upon fraud, and that he presented facts demonstrating that allowing the judgment to stand would be a "fraud on the court."

The court conducted a *de novo* review of those portions of the report or specified proposed findings or recommendations to which objection was made pursuant to 28 U.S.C. § 636(b)(1)(C), and concludes that the findings and recommendations of the Magistrate Judge are correct, and defendant's objections are without merit.

Federal Rule of Civil Procedure 60(b) does not provide a basis for relief from a criminal judgment. *United States v. O'Keefe*, 169 F.3d 281, 289 (5th Cir. 1999). Accordingly, Rule 60(b)

does not provide the court with a jurisdictional basis to consider defendant's motion. The proper vehicle for seeking relief is a motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255. However, as a prior motion to vacate was dismissed, defendant may not file a successive motion to vacate without receiving permission from the United States Court of Appeals for the Fifth Circuit. Defendant does not state he has received such permission. Therefore, Defendant's motion is an "unauthorized [motion] which [this] court lacks jurisdiction to entertain." *United States v. Bermea-Cepeda*, 310 Fed.Appx. 690, 691 (5th Cir. 2009) (citing *United States v. Early*, 27 F.3d 140, 142 (5th Cir. 1994)). As a result, defendant's objections are without merit.

The court concludes that the findings of fact and conclusions of law of the United States Magistrate Judge are correct, and the Report of the United States Magistrate Judge is **ADOPTED**. Defendant's objections [Docket 94] to the Magistrate Judge's report are **DENIED**. It is further **ORDERED** that Defendant's motion [Docket No. 91] is therefore **DENIED**.

So **ORDERED** and **SIGNED** this **10** day of **December, 2010**.



Ron Clark, United States District Judge